IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-250

| | |
|---|---|
| CITY OF CHARLOTTE, a municipal corporation, the CHARLOTTE CITY COUNCIL, the governing legislative body of the City of Charlotte, and FRED ALEXANDER, JAMES WHITTINGTON, MILTON SHORE, JOE WITHROW, PAT LOCKE, KENNETH R. HARRIS, and NEIL G. WILLIAMS, as members of the Charlotte City Council and individually, | ) |
| Petitioners, | ) |
| v. | ) |
| LOCAL 660, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, an unincorporated labor organization, and R. L. MIDDLETON, W. M. BRAWLEY, D. F. BLACK, M. L. KNIGHT and R. D. McCALL, as officers of Local 660 and individually, | ) |
| Respondents. | ) |

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondents herein, R. L. Middleton, W. M. Brawley, D. F. Black, M. L. Knight, and R. D. McCall, ask leave to file the Brief for Respondents in Opposition in the above-captioned matter previously mailed and received by this Court on or about September 12, 1975 without prepayment of costs and to proceed in forma pauperis, pursuant to Rule 53.

The respondents' affidavits in support of this Motion have previously been forwarded to the Court.

Local 660, International Association of Firefighters ("Local 660"), was dismissed as a party plaintiff by the district court below. That dismissal was affirmed by the Court of Appeals For The Fourth Circuit. In any event Local 660 is without funds to pay the costs in this action, especially the costs of printing necessary briefs. Respondents have sought financial aid from the parent International union but have thus far been unsuccessful in obtaining necessary funding.

Respectfully submitted,

Jonathan Wallas

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Suite 730 East Independence Plaza
951 South Independence Boulevard
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Telephone No. (704) 375-8461

Counsel for Respondents.

SEP 12 1975
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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-250

City of Charlotte, a municipal corporation, the Charlotte City Council, the governing legislative body of the City of Charlotte, and Fred Alexander, James Whittington, Milton Short, Joe Withrow, Pat Locke, Kenneth R. Harris, and Neil C. Williams, as members of the Charlotte City Council and individually,

Petitioners,

v.

Local 660, International Association of Firefighters, an unincorporated labor organization, and R. L. Middleton, W. M. Brawley, D. F. Black, M. L. Knight and R. D. McCall, as officers of Local 660 and individually,

Respondents.

A F F I D A V I T

I, R. L. MIDDLETON, being duly sworn according to law, depose and say, in support of respondents' Motion for Leave to Proceed In Forma Pauperis, as follows:

1. I am one of the respondents in the above titled action. I am also the President of the respondent labor union, Local 660, International Association of Firefighters.

2. I am familiar with the financial status of Local 660 and said labor union, because of its financial situation and poverty, is unable to pay the costs of this action, especially the costs of printing necessary briefs.



3. Local 660 is unable to give security for the payment of the costs in this action.

4. Because of my poverty, I am unable to pay the costs of this action, especially the printing of necessary briefs.

5. I am unable to give security for the costs of this action.

6. I have discussed this action with my attorneys, and I believe that my position in this action is correct and just and that the respondents are entitled to prevail herein.

This action involves the respondents' attempts to be free from the arbitrary and capricious actions of the petitioners who have refused to withhold monies for the benefit of the respondents and their chosen labor organization when the petitioners regularly withhold money for the benefit of all other organizations and causes. Respondents have prevailed on the merits in this action in the United States District Court for the Western District of North Carolina, Local 660 v. City of Charlotte, 381 F. Supp. 500 (W.D.N.C., 1974) and in the United States Court of Appeals for the Fourth Circuit, Local 660 v. City of Charlotte, __F.2d__, 89 LRRM 2608 (4th Cir., June 17, 1975).

R. L. Middleton

Subscribed and sworn to before me

this 6th day of September, 1975.

Notary Public

My Commission Expires: 8-23-76

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Respondents.

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**********

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

**********

# BRIEF FOR RESPONDENTS IN OPPOSITION

**********

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Counsel for Respondents

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

**********

BRIEF FOR RESPONDENTS IN OPPOSITION

**********

## OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at ___F.2d ___, 89 LRRM 2608 (4th Cir. 1975). The opinion and order of the United States District Court for the Western District of North Carolina is reported at 381 F. Supp. 500 (W.D.N.C., 1974). Copies of these opinions are appended to the Petition at pp. A-3 to A-14.



## JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit was rendered on June 17, 1975. Petitioners invoke jurisdiction of this Court under 28 U.S.C. §1254(1).

## QUESTION PRESENTED

Whether the court below erred in holding that petitioners violated the First and Fourteenth Amendment rights of the respondents in denying them the right to assert their associational and economic rights by having moneys withheld for their benefit on the same basis moneys are withheld for the benefit of other organizations and for other purposes?

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent Constitutional provisions (Amendments I, IX and XIV) and the pertinent statutes involved (28 U.S.C. §1331, 28 U.S.C. §1343, 42 U.S.C. §1983 and N.C.G.S. §95-98) are set forth in the Petition at pp. 2-7.

## STATEMENT

This litigation brings before this Court the effort of the individual respondents to obtain equal and fair treatment with respect to the withholding of money from their paychecks to be paid for their benefit to Local 660, International Association of Firefighters (hereinafter "Local 660"), in the same manner moneys are withheld by the petitioners for other organizations and other purposes. The court below found that the petitioners' refusal to treat respondents equally and fairly constituted arbitrary and standardless state action which infringed the

First and Fourteenth Amendment rights of respondents to obtain, inter alia, life insurance on a favorable group basis and to retain legal counsel. (Petition at pp. A-5, A-9 to A-11) In addition, the court below found that petitioners had not followed their alleged standard, asserted again in this Court (Petition at p. 9), that they adhere generally to a policy of refusing withholding requests unless the requested withholding is available to all employees. (Petition at pp. A-5, A-10 to A-11). The evidence indicates that of the fourteen purposes for which withholding is now allowed by petitioners (Petition at p. A-10), only six are required by statute (i.e., State and Federal Income Taxes, North Carolina Firemen Retirement, North Carolina Local Government Retirement System, and the City-County and State Tax Levies). Contrary to the alleged standard asserted by the petitioners that a withholding must benefit all employees, certain purposes for which withholding has been granted can be utilized by only some City employees (e.g., Firemen Benefit Fund, the Charlotte Fire Department Credit Union, and Charlotte Fire Department Voluntary Pledge Fund). With respect to certain other purposes for which withholding is allowed (e.g., United States Savings Bonds, United Way, and deferred compensation) all employees can voluntarily opt in or out of the particular program.

Presented with evidence of arbitrary and standardless state action effecting substantive Constitutional rights, the court below issued limited relief to enjoin the impermissable action found (Petition at pp. A-6, A-14).



## ARGUMENT

### I. This Petition Presents No Important Issue Worthy of Review By This Court.

Respondents submit that this action presents no special or important reason which would make this case proper for the granting of a writ of certiorari. There is no conflict among the circuits with respect to the issues litigated herein and no statute, state or federal, has been declared unconstitutional. The result reached below does not turn on any unsettled federal constitutional questions. Rather, the court below invoked constitutional principals and correctly applied them to the particular factual situation presented herein. This action is not one involving "forced collective bargaining". The case simply presents the question whether the constitutional rights of the respondents have been infringed by the arbitrary actions of the petitioners. The limited relief granted to respondents below is wholly consistent with the law and the exercise of sound judicial discretion.

### II. The Decision Rendered Below is Correct.

Assuming arguendo an issue worthy of review in this Court is presented by the Petition, this Court should decline to grant the Petition because all factual and legal issues were correctly decided below.

#### A. Respondents have First Amendment Associational Rights.

The right of association is now clearly established as a freedom deeply embodied in the First and Fourteenth Amendments. As this Court stated in Healy v. James, 408 U.S. 169, 182 (1972):

> Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly and petition. (citations omitted)

See also, NAACP v. Alabama, ex. rel. Patterson, 357 U.S. 449, 461 (1958); Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D.N.C. 1969). Among other things, the First Amendment protects associational activities designed to provide economic benefits for an association's members, including activities designed to obtain legal counsel as asserted herein. Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964); United Mineworkers v. Illinois Bar Association, 389 U.S. 17 (1967); United Transportation Union v. Michigan Bar, 401 U.S. 576 (1971).

B. Respondents have been treated unequally and unfairly by the petitioners.

Respondents' First Amendment rights have been infringed by the special, albeit deleterious, treatment afforded them by the petitioners. Only the respondents have been denied their withholding requests in the Fire Department. (Petition at p. A-10)

Just as the First and Fourteenth Amendments prohibit a state from allowing only "popular" organizations to use public auditoriums and parks for meeting and discussion purposes, the Constitution prohibits petitioners from selectively and arbitrarily denying to the respondents, under the facts of this case, the right to have funds withheld for the organization of their choice. See, e.g., National Socialist White People's Party v. Ringers, 473 F.2d 1010 (4th Cir. 1973); Southeastern



Promotion, Ltd. v. City of West Palm Beach, 457 F.2d 1016, 1019 (5th Cir. 1972).

Contrary to the assertion of petitioners (Petition at p. 17), the relief granted by the court below did not constitute an incursion into the collective bargaining arena. It is the standardless refusal of the petitioners to treat the respondents in the same manner others are treated which gives rise to the constitutional violation found below.

Just as states and municipalities have "dedicated" public auditoriums for the dissemination of ideas, petitioners have arbitrarily allowed certain groups to benefit from withholding. See, Danskins v. San Diego Unified School District, 28 Cal.2d 536, 171 P.2d 885 (Cal. 1946). Petitioners are not required to offer withholding for any purpose not specifically required by statute (Petition at p. A-12). However, once undertaking to provide such a service, petitioners may not discriminatorily select the receipients of municipal benefits. Griffin v. School Board of Prince Edward County, 377 U.S. 218, 231 (1964).

C. Petitioners have offered no compelling State interest or rational basis for their discriminatory treatment of respondents.

Petitioners claimed standard, that withholding is allowed for the benefit of an organization only when the withholding will be beneficial to all city employees, has not been followed in practice. Indeed, this alleged standard was only asserted well after the commencement of this litigation. Since the standard has not been followed and no other permissable reason advanced, the court below properly concluded that petitioners' actions were arbitrary and standardless.

Petitioners have failed to demonstrate that their infringement of respondents' First Amendment rights is compelled by any state interest or is grounded in any rational basis. See generally, NAACP v. Button, 371 U.S. 415 (1963), Dunn v. Blumstein, 405 U.S. 330 (1972). The equal protectional clause requires not necessarily that a statute or policy be applied with exact equality to all persons; however, in defining a class subject to legislation, distinctions that are drawn must have at least some relevance or rational basis to the purpose for which the classification is made. Rinaldi v. Yeager, 384 U.S. 305, 308-309 (1965). No such showing has been made in this action. 1/

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Jonathan Wallas

JONATHAN WALLAS
J. LeVONNE CHAMBERS
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Charlotte, North Carolina 28202

Counsel for Respondents

1/ Questions 3 and 4 asserted by petitioners (Petition at p. 3) are frivolous. N.C.G.S. §95-98 does not prohibit contracts between individuals and municipalities. No contract is required in this case between the City and Local 660 (Petition at pp. A-6, A-13). Finally, the question of whether factual findings are supported by the evidence (Question 4) does not present a proper question for this Court. Rule 19, Rules of the Supreme Court of the United States.

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Respondents.

## RESPONSE TO RESPONDENTS' MOTION TO PROCEED IN FORMA PAUPERIS

Respondents (hereinafter referred to as "applicants"), have filed a motion for leave to proceed in forma pauperis with accompanying affidavits in support of their motion stating that because of their poverty, they are unable to pay the costs of this action or give security for the costs.

Petitioners strongly oppose this motion on the grounds that the affidavits fail to show the financial condition of the applicants and are therefore insufficient. It is admitted that the affidavits do follow the language of the statute (28 U.S.C. §1915), and nothing else appearing, would possibly be sufficient. However, by

an affidavit attached hereto as Exhibit "A", petitioners respectfully show the Court that the applicants moving to proceed in forma pauperis are presently employed by the City of Charlotte in the Fire Department at a regular weekly salary, and have been so employed for a number of years. It is difficult to believe that persons with such a long tenure of employment and currently employed at the salaries shown in Exhibit "A", could possibly be considered by the courts to be indigent unless extenuating circumstances exist. If such conditions do exist, then for the Court to make a determination of indigency, it would be necessary for it to have detailed information as to the financial status of each applicant. The applicants' affidavits presently before this Court merely state that because of their poverty, they are unable to pay the costs of this action, especially the printing of necessary briefs, and that they are unable to give security for the costs.

It is respectfully contended by petitioners that the Court in this case should have more complete financial information regarding these applicants, as well as an estimation of the expected costs. In order to determine if an article or service desired is beyond one's financial reach, then one's net worth, income and the price of the item must all be considered.

In Ward v. Werner, 61 F.R.D. 639 (1974) at page 640, the Court in discussing in forma pauperis proceedings said: "There exists no fixed net worth which disqualifies a party as a pauper. U. S. v. Scharf, 354 F. Supp. 450, Carroll v. U.S., 320 F. Supp. 581. Yet, the mere assertion of poverty does not serve as a



substitute for indigency."

The decision to allow motions in forma pauperis is discretionary and the Court in order to make this decision should have complete information as to the applicant's ability to pay or the public will be burdened with expenses it should not have to bear. The Court in Dreyer v. Iolet, 349 F. Supp. 452 (1972) said that "[i]n order to preclude fraudlent or careless motions of poverty, the applicant moving for in forma pauperis status should state 'with some particularity, definiteness and certainty' the facts as to his poverty. Iefferson v. U. S., 277 F.2d 723, 725, (9th Cir.), certiorari denied 364 U.S. 896, 81 S.Ct. 227, 5 L. Ed. 2d 190 (1960)."

In discussing the difficulty in defining indigence in In re Smith, 323 F. Supp. 1082 (1971) at page 1091, the Court stated: "The Supreme Court has not to our knowledge ever defined the term, although the Court has used it in literally thousands of decisions. It is true that the Supreme Court and numerous lower courts have construed the meaning of indigence as used in the federal in forma pauperis statute, 28 U.S.C. §1915 (1964) ... but these cases are not much help in defining indigence in the constitutional sense. E.g., Adkins v. E. I. DuPont, 335 U.S. 331, 69 S.Ct. 85, 93 L.Ed. 43 (1948); [1] Samuel v. U.S. 420 F.2d 371 (5th Cir. 1969)."

1/ In the Adkins case, the only questions presented related to the sufficiency of the affidavits in the two courts below. E.g., excessive costs, the requirement of attorneys representing the litigant to make affidavits of poverty and the ability of the courts to control the inclusion of unnecessary matters in appeals. In order to reach these more important questions, the affidavits were accepted as sufficient. 69 S.Ct. 85 at page 88.

The Court went on to say that the decision in Bramlett v. Peterson, 307 F. Supp. 1311 (M.D. Fla. 1969), though avoiding a general definition, listed several factors which it thought relevant in determining whether a person is indigent for the purpose of being entitled to counsel in a criminal case:

> "The determination of indigency rests in the sound discretion of the court but it should take into consideration whether the accused has a family or other dependents and how many, if the accused is presently employed or is on welfare, whether he has an income while he is in custody, what amount, if any, he has in checking or savings accounts, the extent of any indebtedness, whether he is incarcerated or free on bond and whether he has adequate assets not presently encumbered or otherwise available." 307 F. Supp. at 1323. In re Smith, supra.

If the above factors were considered necessary to determine indigency in a criminal matter, then surely they would be necessary in a civil matter as the one before this Court.

In making a determination that the requisite is present in forma pauperis, there is no "magic formula", but a careful scrutiny and weighing of all the relevant facts and circumstances involved is required. Dreyer v. Jolet, supra.

Petitioners are aware that the privilege of proceeding in forma pauperis should not be reserved for the destitute, and that a person should not be required to deny his family the necessities of life to maintain a suit, but the mere statement that a man is "poor" is not sufficient to be allowed to proceed in this manner.

It is respectfully urged that Respondent-applicants' motion to proceed in forma pauperis should be denied unless they submit



to this Court sufficient financial information as to income, land holdings, dependency, encumbrances on available resources and checking and savings accounts. We respectfully contend that until the Court receives this information on each applicant, there is no objective basis for determining indigency in this case.

Respectfully submitted,

Henry W. Underhill Jr.

HENRY W. UNDERHILL, JR.

W. A. Watts

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Telephone: (704) 374-2254

Counsel for Petitioners

-5-

NORTH CAROLINA

MECKLENBURG COUNTY

EXHIBIT 'A'

**AFFIDAVIT**

NOW COMES Robert A. Earle, who being first duly sworn, says:

1. That he is a resident of Mecklenburg County and the Personnel Director for the City of Charlotte.

2. That as Personnel Director he is the custodian of the personnel records of the employees of the City of Charlotte.

3. That the following information relative to the five respondent-applicants' employment and job classification and salary range is a part of their personnel record:

| Employee | Job Title | Emp. Date | Weekly Salary | Annual Salary |
|---|---|---|---|---|
| R. L. Middleton | Lt.-Captain | 10/8/62 | $252.85 | $13,148 |
| W. M. Brawley | Lt.-Captain | 4/16/58 | $278.75 | $14,495 |
| D. F. Black | Lt.-Captain | 3/01/57 | $240.81 | $12,522 |
| M. L. Knight | Lt.-Captain | 3/07/55 | $278.75 | $14,495 |
| R. D. McCall | Firefighter-Engineer | 3/07/55 | $229.35 | $11,926 |

Further the affiant sayeth not.

This the 19th day of September, 1975.

Robert A. Earle

Robert A. Earle
Affiant

Sworn to and subscribed before me

this 19th day of September, 1975.

Dolores B. Ballard

Notary Public

My Commission Expires: 6-15-76